STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY DONNELL ELLIOTT, a.k.a. LARRY DARNELL ELLIOTT,

Defendant-Appellant.

UNPUBLISHED
August 31, 2001

No. 223581
Kent Circuit Court
LC No. 98-000596-FH

Before: Holbrook, Jr., P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for delivery of more than 50 but less than 225 grams of a mixture containing cocaine, MCL 333.7401(2)(a)(iii). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to fifteen to twenty-five years' imprisonment. We affirm.

Defendant first argues that the trial court erred when it ruled that his prior convictions could be admitted for impeachment purposes if he testified. The record reveals that defendant did not testify, nor did he express his intention to testify or state the nature of his expected testimony. Therefore, under *People v Finley*, 431 Mich 506, 521, 526; 431 NW2d 19 (1988), defendant has waived this argument. Because defendant waived this issue by intentionally relinquishing his known right to testify, any alleged error in the court's ruling has been extinguished for purposes of appellate review. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Next, defendant argues that the court erred in permitting the prosecution to introduce evidence regarding two prior drug transactions involving defendant and an undercover police officer, contrary to MRE 404(b). Specifically, defendant argues that the probative value of the officer's testimony was substantially outweighed by the danger of unfair prejudice. We disagree. The decision whether to admit evidence is within the trial court's discretion and is reviewed on appeal for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if the evidence is "(1) offered for a proper purpose and not to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, MRE 403." *People v Ho*, 231 Mich App 178, 185-186; 585 NW2d 357 (1998), citing *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998). Damaging evidence is not necessarily unfairly prejudicial evidence. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, modified and remanded 450 Mich 1212 (1995). Rather, unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *Id*. at 75-76, quoting *Sclafani v Peter S Cusimano, Inc*, 130 Mich App 728, 735-736; 344 NW2d 347 (1983).

In this case, defendant's theory of defense at trial was one of mistaken identity. Consequently, the prosecution attempted to prove that defendant was the perpetrator of the charged offense by introducing evidence of two previous controlled drug buys that took place between defendant and the same undercover officer, within approximately a month of the charged offense. Such evidence tended to illustrate that the officer had significant contact with defendant, including face-to-face, and thus could conclusively identify defendant as the perpetrator of the charged offense. We conclude that the evidence was admitted for the proper purpose of establishing identity and it was directly relevant to and highly probative of the issue of identity. Further, in light of the two lengthy limiting instructions given by the trial court as well as all of the evidence presented, the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice. See *People v Charles E Williams*, 240 Mich App 316, 324; 614 NW2d 647 (2000). Therefore, the trial court did not abuse its discretion in admitting the evidence.

Defendant also argues, in his reply brief, that admission of testimony regarding the two previous drug transactions implicated his constitutional right against self-incrimination because there were charges pending at the time of trial. We will not consider this argument because the issue was not properly preserved or presented. Defendant failed to raise the issue below, did not raise the issue in his statement of issues presented, and inappropriately raised the issue in his reply brief. See MCR 7.212(C)(5); MCR 7.212(G); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000); *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999).

Next, defendant contends that the trial court abused its discretion when it denied his motion for a new trial for refusing to hold a hearing or determine whether defendant had been entrapped considering the duration of the police investigation prior to defendant's arrest. We disagree. A trial court's decision whether to grant a new trial is reviewed for an abuse of discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999).

Entrapment occurs when (1) the police engage in impermissible conduct that would induce a person similarly situated to the defendant, although otherwise law-abiding, to commit the crime, or (2) the police engage in conduct so reprehensible that it cannot be tolerated by the

court. *People v Hampton*, 237 Mich App 143, 156; 603 NW2d 270 (1999); *People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997). In this case, as in *Ealy*, defendant has failed to allege any "impermissible conduct" on behalf of the police, other than his general allegation that the investigation went on for too long. Similarly, defendant does not claim that the police engaged in intolerable or reprehensible conduct. In *Ealy*, this Court held that "[e]ntrapment will not be found where the police do nothing more than present the defendant with the opportunity to commit the crime of which he was convicted." *Id*. This rule is dispositive in this case, where police did nothing more than offer defendant the opportunity to sell them various amounts of drugs. Consequently, the trial court properly denied defendant's motion for a new trial on this basis.

Next, defendant argues that the court abused its discretion when it denied his request for additional peremptory challenges. We disagree. The trial court's decision to deny a request for additional peremptory challenges is reviewed for an abuse of discretion. *People v Howard*, 226 Mich App 528, 536; 575 NW2d 16 (1997).

Defendant's argument is based on the premise that the absence of any African-Americans on the jury constituted good cause per se. Defendant's argument is, in essence, a variation of the argument that a defendant has a constitutional right to an impartial jury drawn from a fair cross section of the community. See *Id.* at 532-534; see also *People v S L Williams*, 241 Mich App 519, 525-527; 616 NW2d 710 (2000). To that extent, defendant's argument fails because he has not even attempted to show that the representation of African-Americans in venires from which juries are selected is not "fair and reasonable in relation to the number of such persons in the community" or that "this underrepresentation is due to systematic exclusion of the group on the jury-selection process." See *Howard*, *supra* at 533, quoting *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 493 (1996), quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979). Defendant has phrased his argument simply in terms of an abuse of discretion. Defendant has not, however, cited any authority for the proposition that he, an African-American, was automatically entitled to have African-Americans or other minorities on his jury.

On a showing of good cause, a trial court may grant additional peremptory challenges to a party. MCR 6.412(E)(2); *Howard*, *supra* at 536. Defendant does not explain how he met the "good cause" standard. Instead, defendant in effect argues that the court's denial of his request was unreasonable. Defendant's focus, therefore, is misplaced. Because defendant has not shown that good cause existed, the court's decision was not an abuse of discretion and his motion for new trial on this basis was properly denied.

Next, defendant argues that the prosecutor's reasons for removing the only African-American from the jury panel with his last peremptory challenge were insufficient under *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). We disagree. A *Batson* ruling is reviewed for an abuse of discretion. *Howard*, *supra* at 534.

Under *Batson*, *supra*, a three-prong analysis applies to claims of racially motivated peremptory challenges. First, the person opposing the challenge must make a prima facie showing that the challenge was made with a discriminatory purpose. *Clarke v Kmart Corp*, 220 Mich App 381, 383; 559 NW2d 377 (1996), citing *Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 319; 553 NW2d 377 (1996). Prima facie discrimination might be shown where a pattern of challenges to minority jurors is established or where questions or statements by the prosecutor support such an inference. *People v Maurice Lamar Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989). After a prima facie case is made, the burden then shifts to the party supporting the challenge to proffer a "race-neutral" reason for seeking the dismissal. *Clarke*, *supra* at 383-384. The third and final step of the analysis requires the court to determine whether purposeful discrimination has been shown. *Howard*, *supra* at 534.

In this case, defendant did not establish a prima facie case of discrimination. The thrust of defendant's argument is that the prosecution excused the only African-American juror on the panel for allegedly insufficient reasons. We note that the court failed to require defendant to establish a prima facie case of discrimination before shifting the burden to the prosecution to offer a race-neutral explanation. The challenge to one minority juror alone does not support such an inference; therefore, the court should not have shifted the burden to the prosecution. See *Williams*, *supra* at 137. Nonetheless, because the trial court reached the correct result, it did not commit an error requiring reversal. See *People v Smith*, 243 Mich App 657, 676; 625 NW2d 46 (2000). Furthermore, even if defendant had established a prima facie case of purposeful discrimination, the prosecutor's explanations were legitimate and race-neutral. In sum, the trial court did not abuse its discretion by rejecting defendant's *Batson* claim.

Next, defendant argues that the court erred by reopening the proofs to allow the prosecution to formally admit the cocaine exhibit previously offered. We disagree. A court's decision to reopen proofs is reviewed for an abuse of discretion. See *People v Solomon (Amended Opinion)*, 220 Mich App 527, 532; 560 NW2d 651 (1996), quoting *People v Collier*, 168 Mich App 687, 694-695; 425 NW2d 118 (1988). We note, however, that defendant did not object at the time the proofs were reopened, although he objected when the cocaine was first offered into evidence. Because defendant takes issue on appeal with the reopening of proofs, as opposed to the admissibility of the cocaine exhibit, defendant was required to object when the proofs were reopened in order to preserve this issue. Therefore, we review this as an unpreserved issue for plain error. See *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999).

In ruling on a motion to reopen proofs, the trial court considers whether any undue advantage, surprise, or prejudice results to either party. See *Solomon*, *supra* at 532. In this case, the prosecution took no undue advantage and defendant did not experience surprise or prejudice by allowing the previously offered cocaine exhibit to be formally admitted. We agree with plaintiff's characterization of the issue as one involving a mere "technicality" that does not warrant reversal.

Next, defendant argues that he was entitled to a separate hearing to establish juror bias or misconduct. We disagree. Defendant's allegations of juror misconduct arose for the first time following his conviction, are vague, and unsubstantiated by any evidence. Defendant cites no authority for his claim of entitlement to a hearing regarding his allegations. Defendant may not give cursory treatment to an issue or fail to provide supporting authority for his argument. See *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998). In any event, defendant was given the opportunity to support his claim at the hearing on the motion for new trial; he simply failed to do so.

Lastly, we reject defendant's contention that the cumulative effect of trial errors deprived him a fair trial because none of defendant's claims of error are meritorious. See *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter